Petition

81-457

Office Supreme Court, U.S.
FILED
JUL 28 1981
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

****

CARROLL E. ODEN,
VALTA L. ODEN
Petitioners

vs.

ERNESTINE W. ANDERSON,
CHARLES S. CASAZZA
Respondents

****

ON CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

****

FOR PETITIONERS:
CARROLL E. ODEN and
VALTA L. ODEN
907 Warren Way
Richardson, Texas
75080

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below erred in denying Petitioners' petition for a Writ of Mandamus to compel the Clerk of the U. S. Tax Court to file Petitioners' "Motion for Waiver of Bond or in the Alternative 10% of the Assessment and a Stay of Assessment Pending Appeal."

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NO.

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ERNESTINE W. ANDERSON,
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ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI

Petitioners Carroll E. and Valta L. Oden respectfully request that a writ of certiorari issue to review the Judgement of the United States Court Of Appeals for the District of Columbia Circuit, entered on April 29, 1981.

OPINIONS BELOW

No opinion was handed down in this cause by the United States Court of Appeals for the District of Columbia Circuit, or by the Tax Court. The Order by the United States Court of Appeals for the District of Columbia Circuit is attached as exhibit " A ".

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 USC 1254 (1).

This petition was timely filed prior to the filing deadline of July 28, 1981.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

> "No person shall be...deprived of life, liberty, or property, without due process of law;"

TITLE 26 UNITED STATES CODE, SECTION 7483:

"Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the Clerk of the Tax Court within 90 days after the decision of the Tax Court is entered."

TITLE 26 UNITED STATES CODE, SECTION 7485:

"...the review under Section 7483 shall not operate as a stay of assessment or collection ... unless a notice of appeal... is filed by the taxpayer, and then only if the taxpayer—

(1) on or before the time his notice of appeal is filed with the Tax Court a bond in a sum fixed by the Tax Court...is filed."

STATEMENT OF THE FACTS

The United States Tax Court, Featherston, Judge, rendered it's decision for the respondent, the Commissioner of Internal Revenue in the Case of, Carroll E. and Valta L. Oden, vs. Commissioner Of Internal Revenue, on Jan. 5, 1981(Docket No. 259-79). See Exhibit " B ".

On or about Feb. 27th. 1981 Petitioners attempted to file and submit,to the United States Tax Court, their "Motion For Waiver Of Bond or in The Alternative 10% of the Assessment Pending Appeal".

On March 3rd.,1981 Respondents returned Petitioners' Motion with an accompanying letter stating that the United States Tax Court did not have authority to grant said motion (Exhibit " C ").

On March 18, 1981 Petitioners filed their Petition For Writ Of Mandamus in the Court Below asking that Respondents be compelled to file Petitioners " Motion

For Waiver Of Bond Or In The Alternative 10% Of The Assessment And A Stay Of Assessment Pending Appeal"(Exhibit "D").

On April 29, 1981 the Court Below denied Petitioners Petition For Writ Of Mandamus (Exhibit "A").

SUMMARY OF THE ARGUMENT

Respondents have, by refusing to accept and file Petitioners' Motion for Waiver of Bond or in the Alternative 10% of the Assessment and a Stay of Assessment Pending Appeal", have barred Petitioner from further proceedings within the administrative Branch.

The Court Below by denying Petitioners' petition for a Writ of Mandamus without a written opinion have placed upon this Court the entire burden of determining the substantial Federal question as to Petitionesrs' right to due process of law.

ARGUMENTS

QUESTION NO. ONE RESTATED

WHETHER THE COURT BELOW ERRED IN DENYING PETITIONERS PETITION FOR A WRIT OF MANDAMUS TO COMPELL THE CLERK OF THE UNITED STATES TAX COURT TO FILE PETITIONERS' MOTION FOR WAIVER OF BOND OR IN THE ALTERNATIVE 10% OF THE ASSESSMENT AND A STAY OF ASSESSMENT PENDING APPEAL

ARGUMENT

When Petitioners' filed their Motion For Waiver of Bond or in the Alternative 10% of the Assessment and a Stay of Assessment Pending Appeal they were trying to follow the proceedures for perfecting their Notice Of appeal pursuant to 26 USC Section 7483 which provides:

> " Review of a decision of the Tax Court shall be obtained by filing a Notice Of Appeal with the Clerk of the Tax Court within 90 days after the decision of the Tax Court is entered."

However before this can be done it was necessary for them to obtain,from the Tax Court, a statement of the sum of the bond

that was to be required, pursuant to 26 USC Section 7484 which provides:

> "...the review under section 7483 shall not operate as a stay of assessment or collection... unless a notice of appeal...is filed by the taxpayer, and then only if the taxpayer—on or before the time his notice of appeal is filed with the Tax Court files a bond in a sum fixed by the Tax Court."

By refusing to accept and file their Motion,so that a judge of the Tax Court could rule on it, Respondents have barred Petitioners from further access to to the administrative proceedures and have made it impossible for them to seek review of the motion in the Appeals Court inasmuch as the Appeals Court does not have jurisdiction to review decisions of the Clerk of the Tax Court. The only remedy available to Petitioners was to petition the Court of Appeals for A Writ of Mandamus to compell the Clerk of the Tax Court to accept and file their Motion so

that a Competent Judge could rule on the merits thereof, thus opening the door to further proceedings in the Tax Court or to the Court of Appeals.

By it's failure to grant Petitioners petition for a Writ of Mandamus to compell the clerk of the Tax Court to perform his ministerial duty the Court Of Appeals has denied Petitioners essential due process of law as guaranteed under the Fifth Amendment to the U.S. Constitution. This Court Must correct that error by reversing the decision of the Court Of Appeals and remanding this case for further action consistent with the Fifth Amendment guarantee of due process of law.

QUESTION NO. TWO RESTATED

WHETHER THE COURT BELOW ERRED IN DENYING PETITIONERS PETITION FOR A WRIT OF MANDAMUS WITHOUT RENDERING A WRITTEN OPINION

The Court Of Appeals, by denying Petitioners petition without rendering a written opinion, has placed the entire burden of determining the Federal question upon this Court.Therefore this Court must grant this writ and settle the question as to whether a Clerk of the Tax Court can refuse to perform their purely ministerial duty and thereby deny essential due process of law to one seeking review of a decision of the Tax Court.

The Clear and unambiguous language of 26 USC Sections 7483 and 7485 would indicate that a stay of assessment and Collection is available upon perfection of notice of appeal to the Tax Court. Yet Respondents refused to accept Petitioners' Motion for the same upon the grounds that the Tax Court could not grant said stay.

CONCLUSION

This Court must, in the interest of Justice, review this case and clarify the apparent conflict between the actions of Respondents and the clear and unambiguous language of the statutes under which they are supposed to operate and to correct the apparent error of the Court of Appeals in failing to compell respondents to file Petitioners' Motion for Waiver of Bond or in the Alternative 10% of the assessment and a stay of Assessment Pending Appeal.

Respectfully submitted,

Carroll E. Oden

Valta L. Oden
907 Warren Way
Richardson, Tx. 75080
(214) 690-8746

AFFIDAVIT OF SERVICE

We do hereby certify that three true and correct copies of the foregoing "Petition For Writ Of Certiorari" have been placed in the U.S. Mail, first class postage addressed to Ernestine W. Anderson and Charles S. Casazza, United States Tax Court, Washington, D.C. 20217, and three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.

_____
CARROLL E. ODEN

_____
VALTA L. ODEN

STATE OF TEXAS *
COUNTY OF DALLAS *

Sworn and attested to before me this _____day of September, 1981.

COMMISSION EXPIRES:

_____
NOTARY PUBLIC

_____

EXHIBIT " A "

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1467 September Term, 1980

IN RE: Civil Action No. 00259-79

Carroll E. Oden, et al.,
Petitioners

BEFORE: McGowan, Chief Judge, MacKinnon and Edwards, Circuit Judges

ORDER

On consideration of petitioners' petition for writ of mandamus, it is

ORDERED that the aforesaid petition is denied.

Per Curiam

FILED APR. 29, 1981

GEORGE A. FISHER
Clerk

Chief Judge McGowan did not participate in the foregoing order.

EXHIBIT " B "

T.C. Memo. 1981-6

UNITED STATES TAX COURT

CARROLL E. ODEN and VALTA L. ODEN,
Petitioners
vs. COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 259-79 Filed January 5, 1981

CARROLL E. ODEN, pro se.

LINDA L. WONG, For the respondent.

MEMORANDUM OPINION

FEATHERSTONE, Judge: Respondent determined the following deficiencies in petitioners' Federal income tax and additions to tax for 1975 and 1976:

Carroll E. Oden

Year	Deficiency	Sec. 6651(a)[1/]	Sec. 6653(a)	Sec. 6654
1975	$1,293.13	$323.28	$64.66	$56.27
1976	1,336.98	334.25	66.85	49.90

Valta L. Oden

Year	Deficiency	Sec. 6651(a)	Sec. 6653(a)	Sec. 6654
1975	$513.97	$128.49	$25.70	$22.37
1976	512.65	128.16	25.63	19.13

Petitioners filed Forms 1040 for 1975 and 1976 in which no intelligible information was given with respect to their income and deductions and in which various Constitutional arguments were made. Respondent determined the disputed deficiencies by an indirect method of income reconstruction.

When the case was called for trial, Pe-

1/ All section references are to the Internal Revenue Code of 1954, as in effect during the tax years in issue, unless otherwise noted.

titioner Carroll Oden appeared but offered no evidence to show that the respondent's determinations were excessive. The only contention that he made was that the Federal income tax may not be constitutionally collected from individuals, and consequently the determined deficiencies and additions to tax are erroneous. The argument is frivolous. See the discussion of Article I and the Sixteenth Amendment of the Constitution in Penn Mutual Indemnity Co. v. Commissioner, 32 T.C. 653 (1959).

No evidence having been presented to show that the determinations in the notices of deficiency are erroneous,

Decision will be entered for the respondent

EXHIBIT " C "

UNITED STATES TAX COURT

CARROLL E. and VALTA L. ODEN, Petitioners,	)	DOCKET NO.
v.	)	259-79
COMMISSIONER OF INTERNAL REVENUE, Respondents.	)	

MOTION FOR WAIVER OF BOND OR IN THE ALTERNATIVE 10% OF THE ASSESSMENT AND A STAY OF ASSESSMENT PENDING APPEAL

COMES NOW the Petitioners, Carroll E. and VALTA L. ODEN, and moves the Court for a waiver of bond and a stay of assessment pending appeal in the above styled and numbered cause and would show the Court the following:

I

Posting a bond in the amount of double the assessmentfor the yeares 1975 and 1976 would be an extreme hardship, if not an impossibility, placed upon the petitioners.

Said imposition of twice the assessment being an impossibility to perform would deny the Petitioners the ability to appeal and thereby deny them due process at law.

II

In the event that the Court does not waive the bond, Petitioners feel that 10% of the assessment on the bond is fair and equitable.

III

WHEREFORE PREMISES CONSIDERED, Petitioners request that the court grant Petitioners' Motion For Waiver Of Bond and Stay Of Assessment Or In The Alternative A Reduction Of Bond To 10% Of Assessment And Stay Of Assessment.

Respectfully submitted

_____

CARROLL E. ODEN

_____

VALTA L. ODEN

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served on Linda L. Wong, Attorney, by mailing the same on 27 Feb. 1981 in a postage-paid wrapper addressed to her at 1100 Commerce St., Room 12D27, Dallas, Texas 75242.

This is to further certify that the original of the aforementioned paper was mailed to the Court on 27 Feb.,1981.

Dated: Carroll E. Oden

EXHIBIT "C"- Part Two

UNITED STATES TAX COURT

WASHINGTON,D.C. 20217

March 3 , 1981

Mr. Carroll E. and
VALTA L. ODEN
907 Warren Way
Richardson, Tx. 75080

RE: Docket No. 259-79

Dear Mr. and Mrs. Oden:

This is in response to your Motion and attachments, which we received Mar. 2, 1981, and is being returned for reasons below:

As you know, review of a decision of the Tax Court of the United States shall be obtained by filing a Notice of Appeal with the Clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. The running of the time for appeal is terminated as to all parties by a timely Motion to Vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court.The full time for appeal commences

to run and is to be computed from the entry of an order disposing of such motion,or from the entry of decision, whichever is later.

In the case designated Docket No. 259-79, decision was entered January 5, 1981.

This Court has no authority to either waive the bond requirements or to allow petitioners to proceed on appeal without bond.

The filing of a bond is not a prerequisite to the filing of a notice of appeal. In other words, a Notice of Appeal can be filed without a bond where the party concerned cannot afford the cost of a bond. However, in that instance, the Internal Revenue would unquestionably assess the tax and may attempt collection thereof.

Let me suggest one possible avenue of relief to you. It is my understanding that

taxpayers in a situation similar to yours have been able to arrange an agreement with the district director involved to withold collection activities pending appeal. He cannot, as I understand it, defer assessment; but he has considerable leeway in his collection endeavours. I would hope that you might be able to make such arrangements.

Yours very truly,

Charles S. Casazza
Clerk Of the Court

By ERNESTINE W ANDERSON
Deputy Clerk in charge of
Appellate Matters

Enclosures

Motion with attachments

EXHIBIT "D"

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 81-8012

CARROLL E. ODEN,
VALTA L. ODEN,
Relators

versus

ERNESTINE W. ANDERSON,
CHARLES S. CASAZZA,
Respondents.

PETITION FOR WRIT OF MANDAMUS

TO THE COURT OF APPEALS:

Carroll E. Oden and Valta L. Oden, hereinafter Relators, file this petition for writ of mandamus, pursuant to Rule 16(c) of the Federal Rules of Appellate Proceedure, against Ernestine W. Anderson, Deputy Clerk, and Charles S. Casazza, Clerk of The Court,

Respondents herein, and in support hereof would show unto the Court the following:

I

The Relators were the petitioners in an action for assessment in the United States Tax Court, Docket No. 259-79 and hense relators have a vital interest in the act sought by mandamus herein.

II

That Ernestine W. Anderson and Charles S. Casazza, Respondents, are Deputy Clerk and Clerk, respectfively, of the United States Tax Court, and in that capacity receive and file motions and papers concerning docket No. 259-79.

III

That on or about the 27th. day of February, 1981, Relators attempted to file and submit to the United States Tax Court

a Motion for Waiver of Bond or in the alternative 10% of the Assessment and a Stay of Assessment Pending Appeal in docket No. 259-79 presently pending in the United States Tax Court. (EXHIBIT A).

IV

That on the 3rd. day of March, 1981, Respondents returned Relators Motion for Waiver of Bond or in the Alternative 10% of the Assessment and a Stay of Assessment Pending Appeal with an accompanying letter from the Respondents,(Exhibit B),stating that the United States Tax Court did not have authority to grant said Motion.

V

The United States Tax Court Clerk and Deputy Clerk, Respondents, have refused to accept and file Relators Motion for Waiver of Bond or in the Alternative 10% of the

Assessment and Stay of Assessment in docket Number 25?-79 to this day and continue to do so, contrary to their ministerial duty.

VI

The Relators have no other remedy at law for the refusal of Respondents to perform their ministerial functions and file Relators' motion and Relators continue to suffer injustice and hardship by Respondents' failure to lawfully act in this cause.

VII

The Relators have been grieviously injured by the arbitrary and capricious acts of the Respondents in denying Relators due process of law as guaranteed by Amendment V of the Bill of Rights of the United States Constitution.

WHEREFORE RELATORS REQUEST this Court issue a writ of Mandammus ordering Respondents to receive and file Relators' Motion For Waiver of Bond or in theAlternative 10%

of the Assessment and Stay of Assessment Pending Appeal in docket Number 259-79 in order for the proper Judicial official of the United States Tax Court to pass upon Relators'Motion and for such other relief at law to which Relators may show themselves entitled.

Respectfully submitted

CARROLL E. ODEN

VALTA L. ODEN

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served on Ernestine W. Anderson, Deputy Clerk, by mailing the same on 3-16-81 by certified mail No. p219487579, to her at the United States Tax Court, Washington, D.C. 20217.

This is to also certify that a copy of the foregoing paper was served on Charles S. Casazza, Clerk Of The Court, by mailing the same on 3-16-81 by Certified Mail No. P21948 7580, to him at the United States Tax Court, Washington, D.C. 20217.

Carroll E. Oden

Opposition

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No. 81-457

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARROLL E. ODEN AND VALTA L. ODEN, PETITIONERS

v.

ERNESTINE W. ANDERSON AND CHARLES S. CASAZZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-457

CARROLL E. ODEN AND VALTA L. ODEN, PETITIONERS

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ERNESTINE W. ANDERSON AND CHARLES S. CASAZZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below denying their petition for a writ of mandamus.

The pertinent facts are as follows: On January 5, 1981, the United States Tax Court determined deficiencies and penalties in petitioners' federal income taxes totalling $4,901.42 (Pet. App. 12, 13).[1] Petitioners then attempted to file a document in the Tax Court entitled "Motion For Waiver of Bond or In the Alternative 10% of the Assessment and a Stay of Assessment Pending Appeal" (Pet. App. 15-16).[2] Respondent Ernestine Anderson, the Deputy Clerk

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[1]The Tax Court rejected as frivolous petitioners' contention that federal income taxes could not constitutionally be collected from them.

[2]Although the record is silent on the point, it appears that petitioners did not file a notice of appeal from the Tax Court's decision.

of the Tax Court, returned the motion to petitioners with a letter explaining that the Tax Court had no power to waive the bond requirements of Section 7485 of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. App. 17). Petitioners thereupon filed a "Petition for Writ of Mandamus" with the court of appeals, naming Ernestine Anderson and Charles Casazza, the Clerk of the Tax Court, as respondents, seeking to compel the Tax Court to accept their motion for filing (Pet. App. 18-21). In a per curiam order, the court of appeals denied petitioners' petition (Pet. App. 11).

The court of appeals correctly denied petitioners' petition for mandamus. A writ of mandamus is an extraordinary remedy that will be issued only where exceptional circumstances are present. The party seeking this extraordinary relief has the burden of proving that his right to such a remedy is clear and indisputable. *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976); *Will* v. *United States*, 389 U.S. 90, 95-96 (1967). Further, the issuance of a writ of mandamus is in large part a matter of the discretion of the court to which the petition is addressed. *Kerr* v. *United States District Court*, *supra*, 426 U.S. at 403. Here, petitioners have not demonstrated that any exceptional circumstances exist which would warrant such extraordinary relief, much less that the court of appeals abused its discretion in denying their petition.

Petitioners have been afforded a trial in the Tax Court, and a stay of assessment and collection during that time. They are now seeking, in substance, a means to enjoin the Internal Revenue Service from assessing and collecting the judicially determined deficiencies without offering adequate security. But even had petitioners filed a timely notice of appeal, Section 7485 of the Code explicitly provides that an appeal shall not operate as a stay of assessment or collection, unless a bond in a sum fixed by the Tax Court is

filed. See also Rules of Practice and Procedure of the United States Tax Court, 192 (Jan. 1, 1974). Petitioners' Fifth Amendment rights have not been violated, and there has been no conduct by respondents that would render mandamus an appropriate remedy. Finally, actions that seek to enjoin the Internal Revenue Service from assessing or collecting tax deficiencies are barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and that is in substance the relief that petitioners seek. See also *Commissioner* v. *"Americans United," Inc.*, 416 U.S. 752, 757-758 (1974); *Bob Jones University* v. *Simon*, 416 U.S. 725, 736-737 (1974); *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 5 (1962).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1981

DOJ-1981-10